No. 15-833

In the Supreme Court of the United States

SCOTT KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner*,

v.

ANTONIO A. HINOJOSA, *Respondent*.

ON PETITION A FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Hinojosa argues that the Ninth Circuit correctly applied the look-through rule of *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), to bypass AEDPA, and that any error is "case-specific" and unworthy of correction. Opp. 12-18. He also contends the *Ylst* error is not properly presented (Opp. 18-20), and that correcting it would not change the result in his case (Opp. 20-23). On the merits, Hinojosa argues that the decision below creates no "serious," current, or "real-world" conflict (Opp. 23-33), and creates no significant problem for state officials or prison administration (Opp. 33-37). None of this is correct.

1. a. Hinojosa argues (Opp. 12-13) that there is no "broad[]" open question about how to apply the *Ylst* "look-through" presumption together with the "merits" presumption of *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011). But here the State argues only that *Ylst* cannot be applied where (i) a state supreme court has expressly stated that an unexplained judgment is made on the merits and (ii) the only possible "look-through" ground—improper venue in a trial court—*could not* be the ground for the later judgment. *See, e.g.*, Pet. 10-11.

Hinojosa questions (Opp. 13-14) the State's reliance on the California Supreme Court's clear statement in *In re Reno*, 55 Cal. 4th 428, 447 (2012), that its silent denial of a state habeas petition is a ruling on the merits. He argues that in *Reno* "there were no reasoned opinions by lower courts to look through to." Opp. 14. But he does not explain why that circumstance should limit the state court's explanation of how its judgments should be understood. *Cf. Bradshaw v. Ricky*, 546 U.S. 74, 76 (2005) (per curiam) (federal habeas courts are bound by state courts' interpretation of state law).

Hinojosa also argues (Opp. 14-18) that California's "original writ" system "does not make

Ylst inapplicable." Again, the State has not argued that it does. Rather, applying an *Ylst* look-through makes no sense here.

Hinojosa's state petition invoked the state supreme court's original jurisdiction, and the court was required to grant or deny relief. While the court issued no opinion, one thing is certain: Hinojosa's ex post facto claim was *not* procedurally barred in the state supreme court based on improper *venue*. Even leaving aside *Reno*, there is no basis for using an *Ylst* look-through to rebut *Richter's* "strong" merits presumption. *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). That is especially true where, as here, a particular federal claim is one that state supreme court precedent all but foreclosed; that had been specifically rejected by at least two published state appellate opinions; and as to which the state supreme court had already denied discretionary review and rejected another state habeas petition in which there was no procedural bar question. *See* Pet. 22 & n.7

Hinojosa argues (Opp. 17-18) that the supreme court could have dismissed his petition on the ground that he should first present it to the correct trial court. But *Ylst* presumes that a silent denial rests on *the same* ground as an earlier, reasoned decision. Hinojosa would presume denial based on a *different* procedural ground—lack of exhaustion, not lack of venue.

Moreover, Hinojosa's authorities (Opp. 17-18) make clear that a habeas denial based on failure to exhaust a proper lower-court remedy is made "without prejudice." *See, e.g., In re Steele*, 32 Cal. 4th 682, 692 (2004). Here, nothing suggests that the order denying Hinojosa's petition was anything other than a final adjudication. When a California court issues an order *without* prejudice, it makes that

clear. *See e.g., In re Andres*, 25 Cal. 3d 414, 415 (1979) (denying habeas petition without prejudice to seeking relief in trial court); *In re Baker*, 206 Cal. App. 3d 493, 496 n.1 (1988) (contrasting silent and "without prejudice" denials). Indeed, express language is necessary to make clear that a later filing is not precluded as successive. *See In re Clark*, 5 Cal. 4th 750, 774-775 (1993). Thus, it is scarcely conceivable that the order silently denying Hinojosa's habeas petition was intended to be without prejudice.

The AEDPA issue here is "case-specific" (Opp. 12, 18) only in a sense that will apply to any question about the application of *Ylst* or *Richter* to impose or avoid AEDPA. The State seeks not mere "error correction" (*id.*), but to enforce the prohibition on relitigating federal claims already resolved on the merits by state courts. *Compare, e.g., Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Marschall v. Rodgers*, 133 S. Ct. 1446, 1450-1451 (per curiam). This is especially appropriate where, as here, failure to apply AEDPA has led the appellate court to address a constitutional claim unnecessarily, create a conflict with other courts, and interfere with state prison administration. *See* Pet. 11-12, 19-30. An AEDPA error leading to these consequences is not "unworthy of this Court's review" (Opp. 18).

b. Hinojosa argues briefly (Opp. 18-20) that the State failed to press its AEDPA argument below. But the State has consistently argued that its courts' rejection of Hinojosa's ex post facto claim is entitled to AEDPA deference. The petition advances no new claim. *See, e.g., Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Illinois v. Gates*, 462 U.S. 213, 219-220 (1983). The particular argument advanced now, concerning *Richter's* application, was raised at oral argument below; and the court of appeals, after specifically adverting to the oral argument, held that *Ylst*

applied because the state trial court based its ruling on improper venue. Pet. App. 10a. The State's challenge to that holding is properly presented.

c. Finally, Hinojosa argues that the AEDPA question is not "outcome-determinative." Opp. 20-23. But his theory that the state trial court "overlooked" his claim, *see Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013), is refuted by the record, Pet. App. 43a-45a. And his argument (Opp. 22-23) that he would prevail even under AEDPA, citing *Price v. Warden*, 785 F.3d 1039 (5th Cir. 2012), is refuted by the Ninth Circuit's own opinion. *See* Pet. App. 9a ("If AEDPA applies here, we are bound by our decision in *Nevarez* and must ... [deny] Hinojosa's petition.") It is hard to see how a question could "affect the outcome" (Opp. 20) more than that.

2. The Ninth Circuit's AEDPA error led it into conflict with other courts. Far from being "outdated" (Opp. 23), that conflict is brand new—and wholly avoidable.

a. Hinojosa seeks to distinguish *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000). Opp. 24-25. But he ignores its clear holding that a new prison directive prohibiting gang-classified inmates from earning future good-time credits "was not applied retroactively" because "[b]y its terms, [it] concerned ongoing and future—not past—conduct." 209 F.3d at 66. *Abed* "turned" (Opp. 24) on that point just as much as on the regime's discretionary nature.

To violate the Ex Post Facto Clause, a law must be both retrospective *and* disadvantageous. *Lynce v. Matthis*, 519 U.S. 433, 441 (1997). *Abed* held that the new rule was *neither*. 209 F.3d at 65-66. Even if the regime had been non-discretionary, the court would have upheld the change as not retrospective. *Id.* at 66. The Ninth Circuit's holding under similar facts conflicts directly with *Abed*.

Hinojosa argues (Opp. 24-25) that in *Abed* the prisoner was classified as a gang member after the rule change, while Hinojosa was classified before California amended Section 2933.6. As he concedes (Opp. 25), however, the court below made nothing of this difference. Indeed, the court expressly accepted the state courts' conclusion that Hinojosa's misconduct was a continuing offense. Pet. App. 17a n.8. It based its analysis on the premise that "if the relevant date is the date of the in-prison misconduct," then "§ 2933.6 is not retrospective." *Id.* That is the premise on which the case comes to this Court, and why, absent reversal on AEDPA grounds, the ex post facto issue is cleanly presented for review. *See* Pet. 27-30.

b. Hinojosa also fails to distinguish *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), and *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). He points out (Opp. 25) that *Jones* rested in part on a conclusion that the new DNA statute was not "penal." But the holding relevant here is that officials could treat refusal to comply as in-prison misconduct, and impose a loss of good-conduct credits—regardless of when a prisoner committed his underlying crime. *Id.* at 309-310. The court reasoned that "reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner, and they do not constitute additional punishment [for the underlying crime] and are not classified as *ex post facto*." *Id* at 309.

As to *Ewell*, Hinojosa argues Virginia's "'rate of good conduct time allowed and the structure of the system ... remained constant,'" while the amendment of Section 2933.6 at issue here "changed California's statutory custody credits system itself, not merely regulations administering the statutory scheme." Opp. 26 (in part quoting *Ewell*, 11 F.3d at 486). That

is a distinction without a difference. In this case, as in *Ewell*, if Hinojosa had complied with all prison regulations he would have continued to receive the same credits before and after Section 2933.6's amendment. As he acknowledges (Opp. 27), the crux of *Ewell*'s reasoning was that so long as a new credit-loss provision was triggered only by in-prison misbehavior, any application to new misconduct was prospective. Such changes did not violate the Ex Post Facto Clause because inmates have "no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." 11 F.3d at 486.

Hinojosa argues (Opp. 27) that this Court "rejected this line of reasoning" in *Johnson v. United States*, 529 U.S. 694 (2000). There, the Court observed that treating the consequences of a supervised release violation as "punishment" for that violation would raise constitutional questions. *Id.* at 700. Indeed, treating them as punishment for the original crime was "all but entailed by [the] summary affirmance of *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713 (1968), in which a three-judge panel forbade on ex post facto grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment." *Id.* at 701. Ultimately, the Court resolved *Johnson* on statutory grounds. *Id.* at 700-713.

Johnson considered how to analyze condition-of-release violations. *See, e.g.*, 529 U.S. at 699-701. It did not consider the very different context of administrative sanctions imposed for in-prison misconduct. That context makes a case like *Ewell*—or like this one—quite different from cases like *Johnson* or *Greenfield*. Indeed, the Ninth Circuit,

although it ruled against the State in this case, has expressly acknowledged the difference. *Nevarez v. Barnes*, 749 F.3d 1124, 1129 (9th Cir. 2014) (noting that *Greenfield* did not "address the situation where the state has increased punishment for ongoing prison misconduct").

c. Likewise, *Johnson* does not lessen the conflict between the decision below and the decisions of the California courts. *See* Opp. 1, 28-29, 31; Pet. 19-23. On the contrary, as the petition notes (at 21 n.5), in *In re Ramirez*, 39 Cal. 3d 931, 937-938 (1985), the California Supreme Court specifically considered this Court's affirmance in *Greenfield* and expressly distinguished parole violations from in-prison misconduct. There is no reason to think that the state high court would revisit *Ramirez* in light of *Johnson*'s reliance on *Greenfield*, or make any less of a distinction between *Johnson*'s discussion of supervised release and the in-prison misconduct at issue in this case.

The same distinction accounts for *People v. Callejas*, 85 Cal. App. 4th 667 (2000), which involved a parolee's challenge to a parole-violation fine. That makes the case like *Johnson*, but unlike *Ramirez* or this case. And *In re Lomax*, 66 Cal. App. 4th 639 (1998) is inapposite because it held that new credit-related regulations could not be applied to an inmate *who committed misconduct before the change*. *Id.* at 641; *see* Opp. 29-31. *Lomax* did not address the situation here, where an inmate commits misconduct *after* a change. *See* Pet. App. 17a n.8.

In fact, we know that the California courts would continue to reject the precise ex post facto claim at issue here, because they repeatedly did so. *See* Pet. 21-23, citing *In re Efstathiou*, 200 Cal. App. 4th 725 (2011); *In re Sampson*, 197 Cal. App. 4th 1234 (2011); and *Nevarez*, 749 F.3d at 1127-1128.

Hinojosa offers no response to this demonstrated position of the California courts. Indeed, he never even acknowledges *Efstathiou* or *Sampson*. The Ninth Circuit's constitutional holding in this case creates a square conflict with the state courts.

3. Finally, that conflict, and the Ninth Circuit's constitutional holding, are important in the "real world." *See* Opp. 28, 32-33, 33-37. As the petition explains (at 25-30), they put state prison administrators in an untenable position.

Hinojosa suggests (Opp. 32) that the State can largely ignore the decision below, because in federal habeas proceedings *most* ex post facto challenges *should* be subject to review only under AEDPA standards, and thus rejected under existing California decisions and *Nevarez*. That is, he suggests that state officials flout the Ninth Circuit's conclusion that state law violates the federal Constitution on a theory that most prisoners will be unable to litigate their claims de novo in federal court. But state officials should not have to choose whether to follow the view of the state courts or that of the federal circuit court on a question of federal constitutional law.

That is particularly true where the question implicates both the individual constitutional rights of state inmates and the safe and efficient operation of the Nation's third-largest prison system. It is also especially true where any particular inmate's ability to gain relief from the federal courts would likely rest on idiosyncratic, or even capricious, factors.[1] The

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[1] The decision below has already resulted in at least one paradoxical result. *Gomez v. Peery*, No. 3:12-cv-02338-JD (S.D. Cal. orders filed Aug. 25, 2015 and February 27, 2016) (denying ex post facto claim under AEDPA but then granting relief on plea agreement claim based on violation of an ex post facto law,

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State cannot fairly and effectively administer its prisons, and respond to future penological challenges, where the law ultimately applicable to any given inmate depends on unpredictable factors. Nor would such a system promote respect for the law.

Hinojosa also unduly discounts the potential for civil liability for state officials under 42 U.S.C. § 1983. He argues (Opp. 33-34) that the "typical inmate plaintiff" (Opp. 34) would have to present an ex post facto challenge in a habeas proceeding, rather than a civil claim, because success would necessarily result in an earlier release. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). But if the decision below controls in the federal courts while the State instead follows contrary state-court decisions, any inmate who managed to secure habeas relief would no doubt then seek compensatory and punitive damages, as well as attorney's fees, under Section 1983. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (permitting civil suits if conviction or sentence is invalidated).

Moreover, Ninth Circuit law might permit civil recovery by any inmate whose habeas petition is rendered moot by release from prison. *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002). Under that rule, *Heck's* favorable-termination requirement would not be a prerequisite to a civil action. *Id.* And the plaintiff would surely cite the decision below as a basis for relief. Notably, under this perplexing state of the law inmates would have an incentive to delay or forgo raising the ex post facto claim in habeas proceedings and instead file civil rights suits after their release.

Perhaps most seriously, the decision below would interfere substantially with the State's ability

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(...continued)
citing decision below).

to administer its prisons and to deter serious in-prison misconduct. *See* Pet. 28-30. While this case involves gang-related behavior, the logic of the decision below would extend to any change to prison rules affecting the earning of good-time credits. Pet. 28-29. And as the California Supreme Court concluded long ago, it is "simply infeasible to run a prison" in which some inmates are immune from punishment for misconduct, or groups of inmates face different rules for in-prison behavior based on the dates of their underlying crimes. *Ramirez*, 39 Cal. 3d at 937

As Hinojosa notes (Opp. 36-37), California continues to experiment with many forms of criminal justice reform. It should not be hampered in doing so by the creation of unnecessary legal uncertainty or by flawed constitutional holdings that impede the appropriate use of common and sensible tools of prison administration. Hinojosa's suggestion (Opp. 34-36) that prison officials rely entirely on criminal prosecution to address in-prison misconduct is unrealistic. And while the decision below notes (Pet. App. 19a) that other options not involving loss of good-time credits may remain available, restricting the flexible use of "good time" credits will impose a substantial burden on state prison administration.[2]

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[2] Substitution of the other measures suggested by the court below, including the increased use of segregated housing, would hardly be unproblematic. *See Ayala v. Davis*, 135 S. Ct. 2187, 2209-2210 (Kennedy, J. concurring). Moreover, contrary to Hinojosa's suggestion (Opp. 36-37), changes implemented in accordance with the recent settlement in *Ashker v. Governor of the State of California*, No. 4:09-cv-05796-CW (N.D. Cal.), will neither address nor moot the petition. The *Ashker* settlement changes the criteria for segregated housing for gang affiliates and reduces the time most affiliates will be spend in segregation. It does not eliminate gang validations, or the use

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Particularly in a time of reform and innovation, prison officials need clear, uniform, and workable constitutional guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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of segregated housing for validated inmates who commit other misconduct.